

to the effect that in all cases it is a legal tender of relief to offer admission to the poorhouse, but this was said in a case the proceedings in which commenced in an application to the Sheriff under the 73rd section of the Act, and that it did not raise the present question I think appears very clearly from the opinion of Lord Cowan, who concurred with the Lord Justice-Clerk, and who says this in the opening sentences of his opinion—"Whether the offer to receive the applicant into the poorhouse is a legal tender of relief is one question, and whether the relief offered is adequate and suitable is another and different question. The first is for this Court to decide, but as regards the second the remedy is an application to the Board of Supervision."

I am accordingly of opinion that the decision and dicta in *Forsyth's* case do not affect the present case, in which the pauper has taken the course pointed out by Lord Cowan and made application to the Local Government Board, who now take the place of the Board of Supervision, under sections 74 and 75.

The only remaining question is on the merits of the case, and as to these I have no hesitation in affirming the judgment of the Lord Ordinary, and that upon the grounds clearly and succinctly stated by his Lordship in his opinion. This I may say is my own opinion of the evidence, but it is satisfactory to find that it is also the opinion of the Local Government Board and their officials, whose views on such a question as an administrative body are entitled to some weight.

I accordingly think that the Lord Ordinary's interlocutor ought to be adhered to.

LORD JUSTICE-CLERK—I have had great difficulty in this case. It has not been easy for me to hold that an offer to take a pauper into the poorhouse is not an offer of adequate relief. I have found it difficult to see that relief in the house which is generally adequate in the case of an individual pauper is not an adequate offer in every case. But after consultation with your Lordships I have found reason to modify my view, and to hold that the question of "adequate relief" by offer of the poorhouse may be a question of special circumstances, and that it is not a sufficient answer to an appeal against the adequacy of relief to maintain that an offer of the House must be held to exclude such appeal.

I agree in what your Lordships have said, and I also agree in the views expressed upon the merits of the case.

I should only like to say with regard to the case of *Forsyth v. Nicholl*, 1867, 5 Macph. 293, which gave me considerable difficulty, that in that case the Lord Justice-Clerk was dealing with an application to the Sheriff under the 73rd section of the Act after the offer of the workhouse had been made to and refused by the pauper. The offer there was clearly made to secure the pauper against starvation, and in such a case the offer of the workhouse may be an adequate ground for not interfering.

On the whole matter I agree with your Lordships that the judgment of the Lord Ordinary should be affirmed.

LORD DUNDAS was sitting in the First Division.

The Court adhered.

Counsel for Pursuer (Respondent)—Johnston, K.C.—Wark. Agent—Peter Weir, S.S.C.

Counsel for Defenders (Reclaimers)—Cooper, K.C.—Macphail. Agents—Lindsay, Howe, & Company, W.S.

Friday, December 3.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

INTERNATIONAL BANKING CORPORATION AND OTHERS v. FERGUSON, SHAW, & SONS.

Property—Sale of Moveables—Right in Security—Restitution—Reparation—Accession—Specificatio—Bona fide Purchase of Goods Belonging to Third Party, and Conversion thereof into a New Product.

Foreign oil merchants sold to A, subject to his meeting certain bills to be drawn upon him, a quantity of oil, and sold the bills, with the bills of lading attached, to B. The oil was deposited in store by the shipowners. A accepted but failed to meet the bills. He, however, though without the title and not the owner, sold and issued delivery orders for the oil to C, who, in good faith, purchased the oil, obtained possession of it, and used it by working it up into lard compound, which he sold and delivered to his customers.

In an action for restitution of the oil, or, alternatively, for payment of its value when it was obtained from the store, at the instance of B against C, held that the defender having converted the oil into a new species, was liable to the pursuer for its value.

The International Banking Corporation of New York, Threadneedle House, London, with certain consents, brought an action in the Sheriff Court at Glasgow against Ferguson, Shaw, & Sons, oil merchants, Glasgow, in which they sought to have the defenders ordained to deliver to them 53 barrels of refined cotton-seed oil belonging to them, and failing delivery, and alternatively, to pay to them the sum, as restricted, of £156, 13s. 2d., the value to the pursuers and in the market of these barrels of oil at the date on which the defenders received delivery thereof.

The pursuers pleaded, *inter alia*—“(2) The pursuers being the owners of the oil for delivery of which they claim decree, and being also the holders for value of the bills of lading for said oil, they are entitled

to delivery of the same, and failing delivery to decree for the value thereof. (4) The defenders having acquired the said oil under a pretended sale by the said John M'Nairn & Co., who had no title thereto, were not owners thereof, and did not sell with the authority or consent of the owners thereof or the holders of the title thereto, they obtained no right to said oil, and are bound to make repetition thereof to the first-named pursuers. (5) The defenders having obtained the said oil in virtue of pretended delivery orders granted by John M'Nairn & Company, who were not the owners thereof, and who did not sell said oil, or any of it, under the authority or with the consent of the pursuers, who were, and still are, the owners thereof and holders of the title thereto, the defenders have and can acquire no better title to said oil than said John M'Nairn & Company had."

The defenders pleaded, *inter alia*—" (7) The defenders having, without notice of any defect in the title of John M'Nairn & Company, and in *bona fide*, purchased and paid for the oil in question, and not now being in possession thereof, are entitled to absolvitor, with expenses."

The facts are given in the findings in fact of the Sheriff-Substitute (FYFE), who on 10th August 1908 pronounced this interlocutor—" *Findings in fact* . . . (4) that on or about 21st November 1904, 53 barrels of oil, which form the subject of the present action, were shipped by the Maclay-Prentice Line on board s.s. "Fashoda" at New Orleans by the Union Oil Company, consigned to their order at the port of Glasgow upon bill of lading . . . (5) that the vessel having arrived at Glasgow on or about 26th December 1904, but the bill of lading not being presented, the shipowners warehoused the oil in the public store of Hayman & Son at Commerce Street, Glasgow, in terms of powers to that effect contained in the bill of lading, and obtained from the storekeepers a receipt . . . (6) that the oil had been purchased from the American Cotton Oil Company by John M'Nairn & Company, merchants in Glasgow . . . (7) that the sellers drew upon the purchasers for the price of the oil; (8) that the sellers sold the draft to the pursuers. . . . (9) that the bills of lading, endorsed blank, were attached to the bank draft and handed to the pursuers as collateral security for payment of the drafts; (10) that the bank drafts were duly accepted by the purchasers, but were not paid; (11) that in terms of the arrangement the purchasers, M'Nairn & Company, had no proper right in or title to the goods until they had paid the drafts and received delivery from the pursuers of the bills of lading—neither of which events occurred; (12) that nevertheless the said M'Nairn & Company, not as agents for the American Oil Company but as principals, sold the oil to the defenders; (13) that the defenders had no knowledge of the nature of the transactions between the American Oil Company and M'Nairn & Company; (14) that the defen-

ders received from M'Nairn & Company a delivery order upon Hayman & Son, the storekeepers; (15) that, notwithstanding the said delivery order was not granted with the concurrence of the shipowners who had stored the oil, the storekeepers, without any intimation to the defenders as to the circumstances under which it had been stored, honoured the delivery order granted by M'Nairn & Company, and delivered the oil to the defenders; (16) that the oil was removed from store by the defenders early in February 1905; (17) that the defenders used the oil in the ordinary course of their business for the manufacture of a lard compound, the whole of which they had sold and delivered to their customers, in good faith, and before they had any knowledge of any defect in M'Nairn & Company's title to the goods; (18) that the value of the oil at Glasgow in February 1905, when the defenders received it out of the store, was £156, 3s. 2d.; (19) that the profit made by the defenders out of the manufacture of the oil into lard amounted to £6, 4s.; (20) that in this process the defenders have tendered to the pursuers this sum of £6, 4s. with expenses in full satisfaction of pursuers' claim; (21) that pursuers have refused the said tender: *Findings in law* that in respect the defenders innocently acquired the oil in question by purchase in the ordinary course of business, and converted it in the ordinary course of business, and disposed of the converted article in the ordinary course of business without any notice of defect in their sellers' title, they are not liable to pursuers in restitution or for the value of the oil, but are only liable in indemnification to pursuers to the extent of £6, 4s., being the extent to which they benefited by the conversion of the oil: Therefore decerns against defenders for payment to pursuers of £6, 4s., but in respect this sum was tendered to pursuers, finds defenders entitled to expenses."

Note.—"This case raises questions of very great importance to banks who honour drafts for the price of goods upon the strength of the shipping documents which are the ostensible title to the goods and are attached to the bank draft. The material facts are now agreed upon, and the issue in the case is reduced to a question of law. In effect that resolves itself into this proposition: Is it the law of Scotland that a person who has innocently acquired by purchase goods in the ordinary course of his business, and who has in the ordinary course of business used these goods in a manufacturing process, and has disposed of the manufactured article before he had any intimation of defect in the title of the seller to him, so that restitution by him of the goods themselves has become impossible, nevertheless liable to pay to the real holder of the title to the goods the full value of the goods as at the date he innocently purchased them; or is it the law of Scotland that the liability of the innocent purchaser and manufacturer to the real title holder is limited to

accounting for the profit which has accrued to him from the purchase and manufacture of the goods.

"There is admittedly in this case no room for any suggestion of fraud or connivance on the part of defenders, who have throughout acted innocently and in good faith.

"In my opinion the liability of the defenders to the pursuers does not extend beyond accounting for the profit. The amount of that has been adjusted at £6, 4s. This sum the defenders tendered. They are, therefore, I think, entitled to expenses.

"The very interesting argument submitted by Mr Donald, in my opinion rests upon an altogether erroneous view of the law of Scotland as regards the liability of the person who unfortunately comes into possession of stolen property but who has himself acted in perfectly good faith. The underlying principle of the argument was that the real owner of the stolen property is to have no risk of loss in any circumstances, but that, in some shape or other, the law must either restore to him his lost property or find somebody liable to him for its value.

"I think that this is an entirely mistaken view, for the legal right of the owner of property which has been appropriated without the owner's consent is not a personal right against anybody, but is a right against the property itself. He may follow it up, and when he has found it he may lift it, but that does not make it illegal for any person into whose hands it has innocently come in the ordinary course of business to deal with it in the ordinary course of his business, so long, of course, as he has no intimation of any defect in the title of the person who passed the property on to him. Accordingly, if a person buys goods in good faith, and also in good faith re-sells them, that person has no liability to the real owner, and no duty towards him beyond telling him where the property went, so that the real owner may continue to follow it up.

"The reason for this is just that the real owner has no higher right than to follow the property itself.

"Whilst the most common case in which the question arises is that of re-sale, it seems to me that the legal doctrine which absolves an owner who has innocently bought an article and passed it on in the ordinary course of trade, applies also to a person who has bought a thing for manufacture and has manufactured and sold it. In each case the purchaser has dealt with the property in the ordinary course of business, and in my opinion it is a risk which the real owner of the property runs that in the course of its transmission from hand to hand it may cease to exist, in which event the principle of law which entitles the owner of property to follow it ceases to apply, and a new principle of law comes into operation, which is that no person is entitled to make a profit out of the use of another person's property which has come into his hands without the real owner's consent, however much in *bona fide* he has acted, and that accordingly he

must indemnify the real owner to the extent to which he himself has benefited by dealing with the real owner's property. The duty of the manufacturer is, as he cannot restore the property, at all events so far as he can to restore the situation by putting himself back into the position in which he would have been if he had never acquired the property—that is to say, making no loss and making no profit—and by putting the real owner back into the position in which he would have been if the property had never left him, so far as the result of trading with the property will permit.

"In my view, a money payment is not in the law of Scotland a competent alternative claim to one for restitution of stolen property, for money is not the equivalent of restitution, nor is the innocent holder liable, as the pursuers here seem to think, in a money penalty for inability to restore the property. The owner of the property has a money claim at all only to the extent of indemnification against anybody who makes a profit out of his property.

"Suppose defenders had made a profit of £200 by converting the property, pursuers could not have claimed that £200, but only £150 out of it, for the profit arising from the use of the goods in the defenders' hands does not represent the goods themselves. If it did, the real owner could claim the whole £200 as being the money equivalent of his goods; but he could not do this, for that would be putting him into a better position than he was originally, and he can never claim more than to be indemnified so far as the profit made by the use of the goods will permit.

"I had thought it to have been so clearly established that according to the law of Scotland a person who has in good faith passed on stolen property is not at all liable for its restitution, and that a person who has converted it in good faith without fraud (or such gross carelessness as might amount to fraud) is only liable to indemnification to the extent to which he has been benefited, that I should not have referred to the matter at such length but for a decision which has been very earnestly pressed upon my attention, and which, it is urged, I am bound to follow (*Oliver and Boyd v. Marr Typefounding Company*, 12th October 1901, 9 S.L.T. 170). I, of course, accord the highest respect to the *obiter dicta* of any judge of the Supreme Court, but I cannot accept the view that I am bound to surrender my personal opinion to that of any Outer House judgment which was not carried further; for to do that would be to deprive a litigant of his right to have an independent judgment in the Sheriff Court upon a question competently raised in that Court. I do not, therefore, regard that decision as foreclosing the present question, and I am unable to accept the opinion of the Lord Ordinary as ruling the present case.

"Between the facts in the present case and the facts in the Typefounding case there is this material difference, that in the present case the defenders had un-

doubtedly parted with the manufactured article long before they heard anything about the defective title of their seller; whilst in the Typefounding case it appears to have been a fact, or at least a probability, that the converted article remained in the converter's possession after he had received intimation of his seller's defective title. I am not able to accept the view that this is an accidental distinction, or that it makes no difference in legal result; for the one important element which frees from liability a person who has come into innocent possession of stolen property is that he has, without notice of fraud, passed it on whether in its original form or in a converted form. If in the present case the defenders had been made aware before they parted with the lard of the facts and circumstances which have been disclosed in this process, I am not sure that their legal position would have been exactly the same as it now is; but upon this I offer no opinion, because it is an admitted fact that they had parted with the lard before they knew anything of these circumstances. Even, however, had the facts in the present case been exactly similar to those in the Typefounding case, I could not accept that case as ruling the present, for I do not think the Scotch authorities cited support that judgment. As regards the English authorities I say nothing, except that the subject of restitution seems to me a branch of the law in which it is peculiarly dangerous to apply English decisions to the elucidation of Scotch legal principles. As regards the Scotch cases, I respectfully hold the opinion that none of them negative, and some of them directly support, the view of the law which I have taken."

The pursuers appealed to the Sheriff (GARDNER MILLAR), who on 9th January 1909 pronounced this interlocutor:—"Recals the interlocutor of 10th August last: Finds in terms of the findings in fact therein: *Finds in law* that the defenders, although innocently, but without title, having converted the oil in question belonging to the pursuers, or to which they had right, into a new species, namely, lard, which they have sold, are liable to the pursuers in compensation for the value thereof: Therefore decerns against the defenders for payment to the pursuers of the sum of £156, 3s. 2d. sterling," &c.

Note.—"The question that is now raised is as to the obligation of a *bona fide* purchaser for full value from a seller who had no title to the property to the true owner. The pursuers' agent drew a distinction between property which had originally been stolen and property which had come into possession of the seller without title but not feloniously. So far as the possession of the *bona fide* purchaser is concerned, I do not think there is any distinction between stolen property and other property. The true owner would have the same claim against the innocent possessor of the property without real title in the one case as in the other. The position is laid down by Lord Stair, *Institutes*, i, 7, 2—"Restitu-

tion of things belonging to others may seem to be an effect of property, whence cometh the right of vindication or repetition of anything; but, beside the real action the proprietor hath to take or recover what is his own (which doth not directly concern any other person, and so, being no personal right, hath no correspondent obligation), there is an obligation upon the haver of that which is another's to restore it, and thence a personal right; which is a power in the owner to demand it, not only when it is in the possession of the haver, but if he have fraudfully put it away.' It is admitted in this case that if the oil had still been in the possession of the defenders they would have had no answer to the claim of the owners for restitution. But then it is said that they converted it into lard, and having sold the lard to customers, they are no longer liable in restitution, but are only liable for any profit they may have made upon it. They say the amount of profit they made was £6, 1s., which they tendered to the pursuers. If the oil had remained in the form in which the defenders purchased it, and they had resold it *in forma specifica* to their customers, I do not think that there would have been any doubt that their position was right. Lord Stair, book i. tit. 7, sec. 11, says—"In all these the obligation of restitution is formally founded upon the having of the things of others in our power, and therefore, that ceasing, the obligation also ceaseth. As he who *bona fide* did buy that which did belong to another, if while he hath it it appear to be that other's, he must restore it without expectation of the price he gave for it (but as to that he must take himself to his warrandice expressed or implied by the seller); but if *bona fide* he have sold it before he be questioned, he is free, and not obliged to restore it; though in so far as he did profit by receiving more for it than he gave, he be liable by the obligation of remuneration or recompense.' There are several cases where that doctrine has been followed, notably the recent case of *Morrison v. Robertson*, 45 S.L.R. 284. But I apprehend that Lord Stair is there referring to the re-sale of the article in the same form as the seller purchased it. The reason for the rule seems to be this, that the answer of the innocent purchaser to the true owner is that he has parted with the possession and therefore cannot restore it, but he informs the true owner of the names of the persons to whom he has sold it, leaving him to vindicate his property from them. At the same time he must be prepared to make over to the true owner any profit he had made, because no one can be enriched by the possession without title of the property of another. In the present case, however, the defenders have converted the property of the pursuers into something different from what it originally was. Therefore the true owner could not go against any subsequent purchaser, because their answer would be complete, that what he demanded from them was oil, and what they purchased was lard. As Lord Stair points out, the claim of the owner is a

right to the thing itself, and if the thing itself has disappeared then his *jus ad rem* disappears also. It appears, however, in the present case that it was by the action of the defenders that the property of the pursuers ceased to exist *in forma specifica* and was converted to something else. It is true that their action in doing so was quite innocent and in the ordinary course of their business, but I cannot see why, if it is by their action that the pursuers are deprived of their right to vindicate their property, the pursuers rather than the defenders should bear the loss. The pursuers are entitled to recover the thing, and they have traced it into the possession of the defenders, and it is by the action of the latter that the thing has ceased to be, and thereby the pursuers have lost the power of vindicating it. The defenders therefore, being the last in possession of the thing, and having converted it into something else, seem to me, from that fact, liable to compensate the pursuers for its loss. There are very few cases in our books upon this question, the most recent being the case of *Oliver & Boyd v. Marr Typefoundry Company*, 9 S.L.T. 170, in which Lord Stormonth Darling held that, on the conversion of type which belonged to the pursuers into another shape the pursuers were entitled to decree for the value of the type. I do not say that that case is an authority for the present one, but I think the observations of the Lord Ordinary give a general support to the view I have taken. Certain old cases were referred to, viz., *Scott v. Law*, 1704, M. 9123; *Walker v. Carfrae*, 1765, M. 12,802; and *Ferguson v. Forrest*, M. 4145. None of these old cases seem to me to have much bearing upon the present case, because in none of them was the question of the conversion of the goods claimed into a totally different species raised. All of them were cases of animals, and either the animals or their carcases were the subject of the claim. There was an observation of the Lord Ordinary in the case of *Foulds v. Townsend*, 23 D. 437, which points to a different conclusion. Lord Ardmillan there says—'If the advocate purchased the horse not merely in good faith and without knowledge that it was stolen, but with due care and caution under the circumstances, and then disposed of the horse by slaughtering and using it up, also with the due care and caution which the law requires, then he would only be liable in *quantum lucratus*, which in this case would be a very small sum, probably not exceeding 8s. or 10s.' He does not say what the authority is for his opinion, and it is clearly not necessary for the decision of the question before him. Lord Stormonth Darling in the course of his opinion in the case of *Oliver & Boyd*, above quoted, differs from Lord Ardmillan's opinion, and therefore I do not think it is binding upon me.

"It only remains to say that in the English Courts a much stricter view of the liability of the innocent possessor without title of property belonging to another is taken. That, however, turns upon the

rule as to conversion. In the case of *Hollins v. Fowler*, 1872, L.R., 7 Q.B. 616, a number of the cases on this branch of the law are considered by Mr Justice Brett, and it seems to be laid down that if anyone exercises towards the property the rights of an owner he becomes liable to the true owner for the value of it; and the same view was taken in the case of *Cundy v. Lindsay*, 1878, 3 App. Ca. 459. It appears, therefore, that the English law carries the right of the true owner much further than I think would be admitted in the law of Scotland, but so far as it applies it seems to me to be in favour of the view I have taken.

"In the circumstances I think the pursuers are entitled to decree, with expenses."

The defenders appealed, and argued—So long as the oil remained in the possession of the defenders they would have been bound to restore. Possession of property was lost as soon as it was voluntarily parted with. Accordingly the person having possession, even on an unexceptionable title, was bound to restore, but as soon as he ceased to be possessor of the subject his right of disposal was gone, and with it the obligation to restore—Stair, i, 7, 2; i, 7, 11; Bankton, i, 8, 11; Ersk. Inst., iii, 1, 10; Bell's Principles, sec. 527. Thus there was a duty to restore if there was still possession, but if there had been *bona fide* divestiture there was no such obligation, and any legal divesting on the part of the possessor, so that the article was no longer in his possession, would exclude the right of the true owner to demand restitution—*Scot v. Low*, 1704, M. 9123; *Walker v. Spence and Carfrae*, 1765, M. 12,802; *Faulds v. Townsend*, February 5, 1861, 23 D. 437. The latter, however, was entitled to claim the amount by which the possessor had become *lucratus*. In the present case the oil was no longer *in forma specifica*, but this made no difficulty as regards the principle to be applied. *De facto* the original subject had ceased to exist, and restoration by the defenders was impossible. Further, however, even if the defenders had been liable in restitution the oil in the form of lard compound had been sold, and restoration by the defenders was impossible. *Oliver & Boyd v. The Marr Typefoundry Company, Limited*, July 19, 1901, 9 S.L.T. 170, was distinguishable. There Lord Stormonth Darling appeared to hold that the defenders had failed to prove affirmatively that they had parted with the subject, and the change of form was negligible. *Ferguson v. Forrest*, 1639, M. 4145, therein referred to appeared to have been decided on a specialty. The right of the true owner of stolen goods was a *jus in rem*, and his proper remedy was an action to vindicate possession against the possessor for the time being, but this right terminated upon that possessor ceasing to possess or upon change of form of the goods, which was equivalent to the destruction of the *res*. If, however, the possessor alienated fraudfully, the true owner had, in addition to his right to vindicate his property, an action of damages—Stair, i, 7, 2. By Scots

law the *vitium* attached to the good alone. The law of England was different in this respect, that by the doctrine of conversion an innocent third party was liable in the value of stolen goods even after he had ceased to possess them—Bullen & Leake's Precedents of Pleading, 6th ed., p. 344; *Hollins v. Fowler*, 1875, L.R., 7 Eng. & Ir. App., 757. The English law should therefore not be relied on. Scots law followed the Roman law—Justinian Institutes, iv, 1, 19; iv, 6, 14; iv, 6, 18; Digest, vi, 1, 36; xvii, 2, 46. The present case did not fall under the rules applicable to the Roman doctrine of *specificatio*, the creation of a new species. It did not apply to stolen goods. The present was rather a case of *confusio*.

Argued for pursuers and respondents—The defenders, so long as the goods remained in their possession *in forma specifica*, were bound to restore. But a new question arose in this case. What had taken place was that a new species had been created by the defenders, viz., lard compound. Accordingly the Roman doctrine of *specificatio* here applied. The question now came to be whether this new species could be reduced to its component parts or not. If it could not the defenders were bound to recompense the pursuers. The *res* had now been changed into something else. As a result the true owner of the oil had now, instead of the *vindicatio* or real action to recover his property, a *conditio* or personal action to enforce payment of the value of the material against the possessor of the new species—Justinian, Institutes, ii, 1, 25. This doctrine of the Roman law was found throughout the law of Scotland, and applied wherever the materials had been acquired *in bona fide*—Stair, ii, 1, 41; Bankton, 1, 9, 43; ii, 1, 12; Bell's Principles, sec. 1298; *Wylie & Lochhead v. Mitchell*, February 17, 1870, 8 Macph. 552, 7 S.L.R. 310. The defenders' liability was for the value of the pursuers' goods used by them. It made no difference that the new species had been passed on by them, because the action was a personal action for the value of the materials used by the defenders. *Oliver & Boyd (supra)* was a direct authority against the defenders, as it was held not to be a good defence that the species was changed. *Scot v. Low* did not touch the present question. *Walker v. Spence & Carfrae (supra)* was also different, as in it there was no creation of a new species. *Ferguson v. Forrest (supra)* was certainly in favour of the pursuers if it applied at all, as was also *Faulds (supra)*. In principle the law of England, apart from the doctrine of conversion, did not differ from that of Scotland and might be referred to. A purchaser took goods subject to any infirmity in their title. A person with no title could not give a better title than his own, and the *vitium reale* affected stolen goods wherever they went—*Morrison v. Robertson*, 1908 S.C. 332, 45 S.L.R. 264; *Cundy v. Lindsay*, 1878, L.R., 3 App. Cas. 459. It was a sufficient defence in Scotland

that goods had been passed on, although not so in England—*M'Combie v. Davis*, 1805, 6 East. 538; *Hollins (supra)*. Accordingly in Scotland the true owner must proceed against the person in possession for the time being, while in England he could have proceeded against anyone who had had possession. In effect the systems were the same, because by the Scots law of warrandice ultimate liability rested upon the first seller. The case was really one of specification, but even if *confusio* the result would be the same—Bell's Prin., sec. 1298.

At advising—

LORD LOW—It is not disputed that the oil to which this action relates, so long as it existed *in forma specifica*, remained the property of the pursuers, and that if they had found it in the possession of the defenders they could have demanded restitution. On the other hand it is conceded that if the defenders had in good faith sold the oil, the pursuers could not have claimed from them the value thereof, but only the profit which they made by the sale.

What actually occurred was that the defenders by mixing the oil with some other substance or substances produced an article known as "lard compound," which they sold. In so doing it is admitted that the defenders acted in good faith and in ignorance of any defect in their title to the oil. The Sheriff-Substitute has held that the pursuers are entitled to the profit which the defenders made upon the sale of the lard compound but to nothing more, while the Sheriff has found that the pursuers are entitled to the value of the oil.

The defenders have appealed against the judgment of the Sheriff, and their argument was to the following effect—The reason why a person in the *bona fide* possession of the goods of another is bound to restore them to that other is that the possessor has power to dispose of the goods, and is bound to exercise that power for the purpose of restoring them. If, therefore, the possessor in good faith exercises his power as possessor in such a way that it is no longer possible for him to restore the goods to the true owner, the latter has no claim for the value, but only for any profits which the possessor may have made. It is admitted that that would be the result if the possessor in good faith sold or otherwise transferred the article *in forma specifica* to a third party, and it makes no difference if the impossibility of restoring arises from the way in which the possessor has in good faith dealt with the goods while still in his possession. The right of the true owner (apart from the question of profits, which depends on a different principle) is limited to a demand for restitution of the goods themselves, and if the person against whom the demand is made has, in the *bona fide* exercise of his right as possessor, put it out of his power to restore the goods, the owner has no claim against him.

It seems to me that the fallacy of that argument is that it disregards the vital dis-

inction which there is between the sale or transfer of goods *in forma specifica*, and the dealing with goods in such a way that they no longer exist as separate or separable goods of a particular kind. In the former case it is only the possession of the goods which is changed, the property still remaining in the true owner, and he being entitled to follow the goods and demand restitution into whosoever hands they may come. In the latter case, on the other hand, there is a change in the property of the goods, which may become in their new form either wholly the property of the possessor or the joint property of him and the true owner. In this case I think that the lard compound of which the pursuers' oil was one of the ingredients became wholly the property of the defenders, and if that be the case the pursuers' right is to demand payment of the value of the oil. My reason for saying that the lard became wholly the property of the defenders is that after it was compounded it was plainly impossible again to separate the oil from the other substances of which it was composed. Erskine (ii, 1, 17) states the law applicable to such a case thus—“When by mixing together two or more substances of different kinds, belonging to different proprietors, a new species is formed, which cannot be brought back again to the first condition of these substances, the mixer, whether he be one of the proprietors or a third party, must, as the maker of the new species, become the sole proprietor of the subjects mixed.”

In like manner Mr Bell in his Principles (sec. 1298) says—“Specification is the forming of a new species from materials belonging to another—a change being produced on the substance. . . . The rules are—That if the materials as a separate existence be destroyed in *bona fide*, the property is with the workman, the owner of the materials having a personal claim for a like quantity and quality or for the price of the materials.” In the same paragraph, when treating of “Confusion of Liquids and Commixtion of Solids,” Mr Bell says—“If the union be of substances different, so as to create a *tertium quid*, the property is (according to the rule in specification) with the owner of the materials, or with the manufacturer, according to the possibility or impossibility of restoring the original substances.”

I am accordingly of opinion that the Sheriff was right in holding that the pursuers are entitled to claim from the defenders the value of the oil. That view appears to me to be in accordance with principles in regard to which all the institutional writers from Stair to Bell are agreed. Unfortunately there is singularly little judicial authority on the question, the only case cited to us, in which the circumstances were at all analogous to the present, being that of *Oliver & Boyd* (9 S.L.T. 170), in which Lord Stormonth Darling's judgment in the Outer House (which was acquiesced in) was in accordance with the opinion which I have formed. We were also referred to various English decisions, but

although these decisions do seem to me to favour the pursuers' contention, the English law on the subject appears to differ in material respects from that of Scotland, and therefore I am not sure how far it would be safe to rely upon the English authorities.

For these reasons I am of opinion that the interlocutor of the Sheriff should be affirmed.

LORD ARDWALL—I agree with the opinion which has just been delivered by my brother Lord Low. I concur with him in thinking that the present case must be decided in accordance with the well-established doctrine of specification. It is admitted by both parties that when the oil referred to on record came into the hands of the defenders it was the property of the pursuers, and remained so up to the time that it was mixed by the defenders with other substances and thereby converted into a totally new substance, commonly known as “lard compound.” Having been so converted, the oil ceased to exist, and consequently the pursuers' right to restitution thereof ceased also. But the right remained to them under the doctrine of specification to recover the value of the goods belonging to them which were used by the defenders in forming this new substance. That value is admitted to be £156, 3s. 2d., and for this sum the pursuers are entitled to decree. In this view of the case it is unnecessary for me to go into any discussion of the interesting questions which are dealt with in the notes of the Sheriff-Substitute and the Sheriff.

With regard to the ground of the Sheriff's judgment as explained in his note, I wish to make it clear that so far as I am concerned I am not disposed to concur in the view that the ground of the defenders' liability in this case is that the pursuers have been deprived of their right to vindicate their property by the action of the defenders however innocent, and that therefore as in a question with the pursuers the defenders should bear the loss; nor do I desire to express any opinion with regard to the judgment of Lord Stormonth Darling in the case of *Oliver & Boyd v. Marr Typefoundry Company*, the circumstances of which were very special.

I further wish to say that I do not consider the English decisions which have been referred to by the Sheriffs and by counsel for the parties can be relied on as safe guides in a case which must be decided according to Scots law. These decisions all proceeded upon the doctrine, or perhaps I should rather say the form of action, formerly known as “trover” and now as “conversion”—a doctrine and process peculiar to the law of England, and which, so far as I understand it, is in some applications of it at variance with the principles of Scots law.

Subject to these remarks I am of opinion that the interlocutor of the Sheriff ought to be adhered to.

LORD JUSTICE-CLERK—In this case the defenders, when in possession of the oil in

question, were so without a title. The pursuers, without doubt, could have vindicated their proprietary right, and enforced delivery, unless the defenders could show that they had in honest course of dealing parted with the goods to others. For if the goods were not in possession of the defenders, the only right of the true owner being to get delivery of the goods, he could not make it good.

Here the case is peculiar, for the oil which belonged to the pursuers was used by the defenders to make what is called a "lard compound." This created a new species, and in such form that separation was no longer possible. In these circumstances the question is whether the law of *specificatio* applies.

I agree with your Lordships that it does.

It is unfortunate that in the conduct of the case the pursuers down to a late period placed their case on their right to delivery of the oil. Accordingly the pleas they state do not set forth *specificatio* as a ground of claim, and it appears that this ground was not brought forward in the case as conducted by the Sheriff-Substitute. But I have come to the conclusion that the case may be disposed of as one of *specificatio*. My brother Lord Dundas, whose opinion I am about to read, deals with the matter fully, and I content myself with expressing my concurrence with his opinion on that matter.

LORD DUNDAS—[Read by the Lord Justice-Clerk]—This is an interesting and a rather peculiar case, and we had a very good argument upon it. Two points seem to be clear, and indeed were treated as matters of common ground by parties' counsel at the discussion. On the one hand it was conceded that if at the time when the pursuers claimed delivery the defenders had had in their possession the subjects claimed, viz., certain barrels of oil, the defenders could have made no good answer to the demand. On the other hand it was conceded that if before any claim for delivery the defenders had *in bona fide* sold and parted with the barrels, the pursuer's demand must have failed, though in that event they would have been entitled to exact from the defenders any profit which the latter had made upon their sale. But the peculiarity of this case is that neither of these situations have arisen, because the defenders, prior to any demand upon them by the pursuers, used the oil in the course of their business, and acting in perfect good faith, for the manufacture of lard compound (which I understand to be a composition of oil and other material of the nature of suet), and sold and delivered this compound to third parties. In this state of matters it seems to me that the case is a pure type for the application of the Roman doctrine of *specificatio*. The oil at the date of the pursuers' claim no longer existed in its original and proper form; a new species had been created, of which the oil was an ingredient, but of which the component parts could not after the creation be again resolved into their original elements. The

doctrine of *specificatio* is undoubtedly part of the law of Scotland. It is so recognised by all our institutional writers. The result accordingly in this case is, in my opinion, that the defenders became the sole proprietors of the lard compound, and that the pursuers have a good claim against them for the value of the oil.

But the defenders' counsel made a serious attack upon the state of the pursuers' pleadings, which I think deserves consideration. It seems clear enough that when the action was raised the pursuers' advisers had not apprehended the true strength of their position in law. The principal conclusion of their petition was for delivery of the oil. The whole theory of their averments and pleas-in-law was that the pursuers were still the true owners of the subjects they sought to recover; and this theory appears to have continued as the basis of their case until after the parties had adjusted a joint minute of admissions, upon which they renounced further probation, and had debated the cause before the Sheriff-Substitute. The defenders upon record (Ans. 8) "explained that restoration is impossible, the defenders having used the same" (*i.e.* the oil) "in the manufacture of lard compound, which has since been sold." To this the pursuers made (Cond. 8) a cautious counter-statement, not admitting that the oil had been used as stated, and averring that in any event it was not received and used by the defenders *in bona fide*, but they knew, or should have known, that they were not entitled to receive and use the oil. No one of the pursuers' pleas-in-law raises the argument based upon the doctrine of *specificatio*. It seems to have been only when the case came before the learned Sheriff that the pursuers' position was maintained upon more dextrous lines. But the petition does contain a crave, as alternative to that for specific delivery, for payment of a sum restricted to £156, 3s. 2d., which is explained (Cond. 7) to be the value of the oil at the date when the defenders received it; and one finds in the joint minute an admission that the total value of the oil at the said date was represented by the figure above mentioned. I do not think that the defenders' counsel made out that their case had been materially prejudiced by the pursuers' resourceful though tardy development of their legal argument; and it seems to me that we may safely give decree for the sum sued for under the alternative conclusions of the petition (as restricted) as the admitted value of the oil. I am therefore of opinion that the interlocutor of the learned Sheriff should be affirmed.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new decern against the defenders for payment to the pursuers of the sum of £156, 3s. 2d., with interest thereon as sued for. . . ."

Counsel for Pursuers (Respondents) — Hunter, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Appellants) — Clyde, K.C.—Moncrieff. Agents—Webster, Will, & Company, W.S.

Saturday, December 4.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

ROBERTSON v. PRIMROSE & COMPANY.

Reparation—Master and Servant—Volenti non fit injuria—Additional Risk—Defective Crane—Averments—Relevancy.

In an action of damages for personal injuries at the instance of a workman against his employers the pursuer averred that on a date specified, while at work as an ironmoulder, an occupation which necessitated his working in a stooping position, he was struck on the head by the chain block of a crane; that on a subsequent date, having remained in the same employment, he was again struck on the head by the chain block of the crane; that the crane was very much off the plumb and only remained stationary at the point of equilibrium; that on both occasions when the pursuer was struck it was moving back to that point from the place where it had been used; that the defenders were aware of its defective condition; and that it was a source of danger to anyone whose place of work was at or near the line of its orbit as it moved towards the point of equilibrium.

Held (rev. judgment of Lord Guthrie, Ordinary) that the pursuer could not be presumed to have undertaken the risk of the defective condition of the crane, that not being an ordinary risk incidental to his employment, and consequently that, *quoad* both the occasions specified, issues must be allowed.

Smith v. Baker & Sons, [1891] A.C. 325, applied.

Robert Robertson, ironmoulder, Ferry Road, Leith, brought an action against Primrose & Company, ironfounders, Albert Foundry, Leith, in which he claimed the sum of £500 as damages for personal injuries sustained by him while in the defenders' employment.

The pursuer averred—"(Cond. 2) In the defenders' works at Albert Foundry fore-said there are four cranes. One of them, which is situated near a furnace, is an old wooden crane with a wooden upright and jib, having a heavy double purchase iron chain block, weighing 40 or 50 lbs., hanging from the jib. On or about 19th September 1906 the pursuer was engaged at his work near said furnace when he received the injuries after mentioned. The pursuer's duties consisted of his preparing moulds

in sand upon the floor of the workshop to receive the molten metal for moulding it into shape, and necessitated his doing said work in a stooping or sitting posture. The pursuer was in the act of rising when he was suddenly and without any warning violently struck on the right side of the head and beneath the right eye by the said iron chain block of said crane and hook attached to it, whereby he was seriously injured and his cheekbone fractured immediately under the right eye. . . . (Cond. 4) On the morning of 8th October 1907, about six o'clock a.m., the pursuer, who had continued in the employment of the defenders, . . . was again struck by the iron chain block of said crane on the right side of his head. He was engaged at his said work of making moulds in connection with a pedestal. . . . It was quite dark at the time, and the shop was, moreover, badly and insufficiently lighted. The light was not sufficient to enable the pursuer to continue his work, and when the chain block struck him he was in the act of rising to get for a lamp to improve the light. About 11 a.m. he took a fit, which was the result of the injuries before mentioned, and he was thereupon dismissed by the defenders from their employment. . . . (Cond. 6) The foresaid accidents were due to the fault of the defenders. A crane in proper order remains stationary at any point where it is being worked. The crane in question, however, was very much off the plumb, with the result that it would only remain stationary at the point of its equilibrium. When it was being worked at any point other than the point of equilibrium it at once swung back to this point whenever the work was done. The result of this movement was that the jib with pendant iron chain block swung through the air until the point of equilibrium was reached. On both occasions when the pursuer was struck by the iron chain block of said crane it was moving back to the point of equilibrium from the place where it had been used. The defenders knew that said crane was off the plumb, and that it was a source of danger to the pursuer and anyone whose place of work was at or near the line of its orbit as it moved towards the point of equilibrium, but they failed to remedy this defect although that could easily have been done. There was no mechanism in connection with said crane whereby the craneman could prevent it swinging in the manner condended on. If said crane had not been off its plumb said accidents would not have happened. At the beginning of the present year it was substantially in the same condition in which it was at the dates of the accidents to the pursuer. Further, the second blow received by the pursuer was in part due to the defenders' fault in failing to have their premises properly lighted. . . ."

He proposed the following issues—" (1) Whether on or about the 19th day of September 1906, and in or near Albert Foundry, Jane Street, Leith, the pursuer while in the employment of the defenders was injured in his person through the fault